

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





74-1503

To be argued by  
Stuart R. Shaw, Esq.

B

P/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

JEREMIAH EDWARD SCANLON,

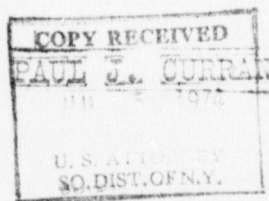
Appellant.

No. S 73 Cr. 790

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APPENDIX FOR APPELLANT

---



Stuart R. Shaw, Esq.  
LEAVY AND SHAW, ESQS.  
233 Broadway  
New York, New York 10007  
(212) 233-8991



PAGINATION AS IN ORIGINAL COPY



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA,

-against-

JEREMIAH EDWARD SCANLON,

Appellant.

APPENDIX FOR APPELLANT

STUART R. SHAW, ESQ.  
Leavy and Shaw, Esqs.  
233 Broadway  
New York, New York 10007  
(212) 233-8991

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USA-333-527 - IND/INF - DISTRIB. POSSESS NARC. DRUG  
Rev. 5-27-72

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

JEREMIAH EDWARD SCARLETT,

Defendant .

INDICENT

71 Cr. 608

The Grand Jury charges:

On or about the 8th day of June, 1973  
in the Southern District of New York

JEREMIAH EDWARD SCANLON,

the defendant , unlawfully, intentionally and knowingly  
did distribute and possess with intent to distribute a  
Schedule II narcotic drug controlled substance, to wit,  
32 grams of cocaine hydrochloride.

dis

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

For: \_\_\_\_\_  
For: \_\_\_\_\_

\_\_\_\_\_  
PAUL J. CURRAN  
United States Attorney

X

USA-338-538 - IND./INF. (Conspiracy to distribute and possess with  
Rev. 5-27-72 intent to distribute narcotic drug.)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*Given 8/1*

UNITED STATES OF AMERICA,

- v -

JEREMIAH EDWARD SCARLON,

Defendant

Indictment

3 73 oz. 74/6



**The Grand Jury charges that:**

1. From on or about the 1st day of June, 1973, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JEREMIAH EDWARD SCANLON,

the defendant and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

- (1) On June 8, 1973, the defendant JEREMIAH EDWARD SCANLON had a conversation with a man;
- (2) On the same date, the defendant JEREMIAH EDWARD SCANLON made a telephone call.

PAUL J. CURRAN  
United States Attorney

FOREMAN





intent to distribute narcotic drug.)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

JAMES B. BROWN,  
 JAMES B. BROWN, and  
 JAMES B. BROWN, and

Defendant, .

**WOLFE**

6732.790 (EW)

2025 RELEASE UNDER E.O. 14176

1. From on or about the 3<sup>rd</sup> day of Jan, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

THE UNIVERSITY OF CHICAGO  
CHICAGO, ILL. 60637

the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York: , on June 8, 1970;

- (1) the defendant, JEREMIAH SCHWARTZ had a telephone conversation with a man;
- (2) the defendant, JEREMIAH SCHWARTZ, met with two men at P.J. O'Toole's Restaurant & Bar, 849 Third Avenue;
- (3) the defendant, JEREMIAH SCHWARTZ and JAMES EARL RAY, had a telephone conversation;
- (4) the defendant, JEREMIAH SCHWARTZ, had a meeting with a man at P.J. O'Toole's Restaurant & Bar, 849 Third Avenue; and
- (5) the defendant, JEREMIAH SCHWARTZ, and a man entered an automobile parked in the vicinity of 849 Third Avenue.

(Title 21, United States Code, Section 846)



JPS:127

RETURN COUNT

The Grand Jury charges that:

On or about the 3rd day of June, 1973  
in the Southern District of New York,

SERGIUS SCARLIN,  
PATRICIA ANN SARAGHTI,  
SANE DCI, a/k/a "BUB",

the defendant(s), unlawfully, wilfully and knowingly did ~~receive~~  
distribute and possess with intent to distribute a

Schedule III narcotic drug controlled substance, to wit,

approximately fifty-five (55) grams of cocaine, in  
violation of Title 21, United States Code, Sections 812,  
841(a)(2) and 841(b)(2)(A).

~~(Title 21, United States Code, Sections 812,  
841(a)(2) and 841(b)(2)(A))~~

(Title 21, United States Code, Section 846)

FORIXAN

PAUL J. CURRAN  
United States Attorney

012999

## REPORT OF PROPERTY COLLECTED, PURCHASED OR SEIZED

AGENCIES INVOLVED:		1. NAME OF SUBJECT OR ESTABLISHMENT		2. FILE NUMBER	
<input checked="" type="checkbox"/> BNDD ONLY	<input type="checkbox"/> JOINT CUSTOMS	Jermiah Edward SCANLON		C1-73-0235 (Op. 61)	
<input type="checkbox"/> JOINT STATE/ LOCAL	<input type="checkbox"/> OTHER	3. REGION OR DISTRICT		IDENTIFIER	
		T.O.		4-03	
DESCRIPTION OF:		4. DATE		June 12, 1973	
		<input type="checkbox"/> PURCHASE <input type="checkbox"/> SEIZURE <input type="checkbox"/> FREE SAMPLE <input checked="" type="checkbox"/> OTHER			

5. EXHIBIT NUMBER	6. ALLEGED DRUGS	7. MARKS OR LABELS (DESCRIBE FULLY)	8. APPROXIMATE GROSS QUANTITY	9. ILLEGITIMATE VALUE OR COST
3	suspected cocaine	Contained in a small piece of aluminum foil, bearing no marks or labels; further contained in a book of matches w/writings, AIRJAMAICA. Evidence retained in original container. Initialed by SA's Moser & Lough	Traces	\$10.00

## OTHER PROPERTY

10. NUMBER	11. NAME AND DESCRIPTION OF ARTICLES	12. ESTIMATED VALUE
3a	(1) matchcase book w/writing "AIRJAMAICA" on the outside, color of the book, white.	

13. REMARKS		14. SOURCE	
Exhibit # 3 was surrendered to SA Moser by Patricia SADOWSKY on 6/9/73, at approximately 1:10AM, in apartment #6 at 232 E. 53rd St.; NYC, NY. Ex# 3 was turned over to SA Lough by SA Moser at this time. SA Lough on 6/9/73, secured Ex#3 in the Office safe at BNDD N.Y. Regional Office. On 6/12/73, SA Moser removed Ex#3 from the safe and processed same in the presence of SA Lough.		<input checked="" type="checkbox"/> FOREIGN OR <input type="checkbox"/> DOMESTIC <input checked="" type="checkbox"/> ILLICIT OR <input type="checkbox"/> LICIT	
15. SUBMITTED BY SPECIAL AGENT'S SIGNATURE AND DATE		16. APPROVED BY REGIONAL DIRECTOR'S SIGNATURE AND DATE	
Richard L. Moser, Special Agent, 6/12/73		Peter Pallatoni, Group Supervisor, 6/12/73	

## LABORATORY EVIDENCE RECEIPT REPORT

17. NO. PACKAGES	18. RECEIVED FROM (SIGNATURE AND DATE)	19. TITLE
1	R. L. Moser - June 12/1973	SA
20. SEAL	21. RECEIVED BY (SIGNATURE AND DATE)	22. TITLE
<input checked="" type="checkbox"/> BROKEN <input type="checkbox"/> UNBROKEN	John Lough 6-12-73	

## LABORATORY ANALYSIS/COMPARISON REPORT

23. ANALYSIS SUMMARY AND REMARKS						6/19/73
Ex. 3 contains lidocaine, procaine and sugar.						12999
Gross weight 0.22gms Net weight 0.03gms						
24. EXHIBIT	25. ACTIVE DRUG INGREDIENT (ESTABLISHED OR COMMON NAME)	WEIGHT PER UNIT ANALYZED			29. TOTAL NET	30. RESERVE
		26. STRENGTH	27. MEASURE	28. UNIT		
3	No controlled substance detected					.01gms
31. ANALYST (SIGNATURE)		32. TITLE			33. DATE COMPLETED	
Edward Thompson		Chemist			6/15/73	
34. APPROVED BY		35. TITLE			36. LABORATORY LOCATION	
R. L. Moser		Chief Chemist			New York	

## SEAL RECORD

37. DATE SEALED	38. IDENTIFICATION ON SEAL	39. DATE BROKEN	40. BROKEN BY (SIGNATURE)
6/12/73	RM: FSL	6/14/73	E. Thompson
6/15/73			



UNITED STATES MAGISTRATE  
UNITED STATES DISTRICT COURT  
UNITED STATES COURTHOUSE  
FOLEY SQUARE  
NEW YORK, N. Y. 10007

Exhibit A

MARTIN D. JACOBS  
MAGISTRATE

September 26, 1973

Mrs. Jan Kweit  
Jan Kweit Associates  
30 Highland Drive  
North Caldwell, New Jersey 07006

Dear Mrs. Kweit:

I am forwarding to you five records in the case  
of U.S.A. v. Robert Seamlon which must be transcribed within  
two weeks.

I also enclose Mr. Stuart Shaw's personal check for  
\$35.00 which you requested in your telephone conversation with  
Mr. Shaw this afternoon. Please bill Mr. Shaw directly for the  
balance at his office at 233 Broadway, Suite 4901, New York,  
New York 10007 (business card enclosed). The recordings should  
be returned to me - Karen M. Thomson, U.S. Court House, Foley  
Square, New York, New York 10007 (Room 1602).

Thank you.

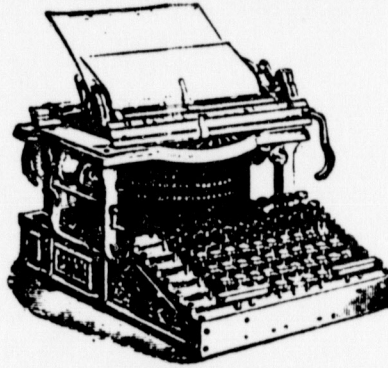
Very truly yours,

Karen M. Thomson  
Secretary to Magistrate Jacobs

Encl.

CERTIFIED MAIL - RETURN RECEIPT REQUESTED  
CERTIFIED #732672





Jan Kweit Associates, Inc.

30 Highland Drive, North Caldwell, New Jersey, 07006  
201-228-4481

October 12, 1973

Stuart R. Shaw, Esq.  
Leavy, Shaw & Horne, Esqs.  
233 Broadway - Suite 4901  
New York, New York 10007

RE: U.S.A. v. Jeremiah Scanlon

Dear Mr. Shaw:

In accordance with our recent telephone conversation, I am sorry to inform you that I was not able to transcribe the above referenced hearing.

The records were full of static and the voices were so low that it was impossible to hear what was being said. A few words here and there were audible, but not even as much as a sentence at a time.

You originally sent me a deposit of \$35.00 for this work; I am sending you my check for \$25.00, retaining \$10.00 for the costs of listening to the records, etc.

I regret that we could not be of more help to you in this matter, but if I can ever be of further service, please let me know.

Sincerely,

*Jan Kweit*  
Jan Kweit

JK:vb  
Enc.

JPC,Jr:1w

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA

: AFFIDAVIT

- v -

: S73 Cr. 790

JEREMIAH SCANLON,  
PATRICIA ANN SADOWSKY, and  
JANE DOE, a/k/a "Sue",

:  
:  
:  
Defendants.  
-----x

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

JOHN P. COONEY, Jr., being duly sworn, deposes and  
says:

1. I am an Assistant United States Attorney in  
the office of Paul J. Curran, United States Attorney for the  
Southern District of New York, and am in charge of the above  
captioned case. I make this affidavit in opposition to the  
defendant Jeremiah Scanlon's motion to dismiss the indictment  
herein.

2. The defendant Jeremiah Scanlon argues that yhis indictment should be dismissed because the tapes of a hearing held before United States Magistrate Sol Schreiber on June 11 and 12, 1973 are so inaudible as to be impossible to transcribe. The defendant contends that the failure of the United States Magistrate to provide an audible recording of this hearing violates Rule 5.1(c)(1) of the Federal Rules of Criminal Procedure, and therefore, precludes the defendant from preparing his defense in this case. This contention is entirely without merit.



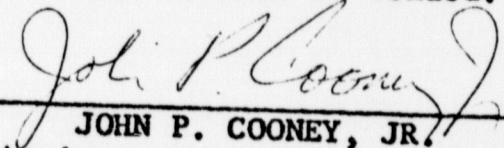
JPC:lw

3. First, the defendant Jeremiah Scanlon fails to set forth any contention with respect to the content of these tapes which would allow the Court to determine the nature and degree of the alleged prejudice to the defendant caused by the unavailability of a transcript of the tapes.

4. Attached hereto as Exhibit A and incorporated herein is the affidavit of Assistant United States Attorney Robert B. Hemley which states that the hearing conducted on June 11 and 12, 1973 was not a preliminary hearing, but rather was a hearing brought on by the Government for the purpose of increasing the bail on the defendant Jeremiah Scanlon. Therefore, the provisions of Rule 5.1 which deal with the record of preliminary hearings for probable cause, are inapposite to the present case. No comparable provision, relating to bail applications, exists in the Federal Rules of Criminal Procedure.

5. Filed herewith is a brief memorandum of law in support of the Government's contention that unless there is a showing that tapes or other recordings are unavailable through the fault, fraud or duplicity on the part of the Government, then unavailability should not be charged against the Court in the prosecution of its case. As the defendant Jeremiah Scanlon does not charge that the inaudibility of these tapes was intentionally caused by the Government, there is no factual basis or legal authority for defendant's motion.

WHEREFORE, the Government respectfully requests that the motion of the defendant Jeremiah Scanlon be denied.

  
\_\_\_\_\_  
JOHN P. COONEY, JR.  
Assistant United States Attorney

Sworn to before me this  
7 day of November, 1973.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
UNITED STATES OF AMERICA, :

-v-

AFFIDAVIT

JEREMIAH SCANLON, : S 73 Cr. 790 (EW)  
Defendant. :

----- x  
STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:  
SOUTHERN DISTRICT OF NEW YORK)

ROBERT B. HEMLEY, being duly sworn, deposes  
and says:

1. I am an Assistant United States Attorney in  
the office of Paul J. Curran, United States Attorney for the  
Southern District of New York, and as such I was in charge  
of the above-captioned case from June 9, 1973, to  
June 15, 1973.

2. I make this affidavit in response to defendant's  
motion for a dismissal of the indictment.

3. Defendant was arrested on June 8, 1973. On June 9, 1973, defendant was arraigned before the Honorable Sol Schreiber, United States Magistrate, upon a complaint which charged him with possession of cocaine with the intent to distribute it in violation of Title 21, United States Code, Sections 812 and 841. Magistrate Schreiber remanded the defendant in lieu of a \$10,000 Personal Recognizance Bond secured by \$2500 cash. A preliminary hearing on probable cause was scheduled for June 18, 1973.

4. The Government determined that in its opinion the bail set by Magistrate Schreiber was inadequate to insure the defendant's appearance. Accordingly, the Government applied to the Magistrate's for a bail increase. On June 12, 1973, a hearing limited to the question of bail was held before the Honorable Sol Schreiber.



Testimony was elicited reflecting statements the defendant had made concerning his ability to produce large quantities of cocaine. At the conclusion of the hearing, defendant's bail was increased to \$20,000 cash on surety bond.

5. On June 13, 1973, The Grand Jury returned indictment 73 Cr. 578 charging defendant in one count with the distribution of cocaine and the possession of cocaine with the intent to distribute it. Defendant was arraigned on indictment 73 Cr. 578 on June 15, 1973 before the Honorable Edmund L. Palmieri. At that time defendant entered a plea of not guilty. Judge Palmieri raised defendant's bail to \$50,000 cash or surety bond.

*RBH*  
\_\_\_\_\_  
ROBERT B. HEMLEY  
Assistant United States Attorney

Sworn to before me this  
day of November, 1973.

NOTARY PUBLIC  
Notary Public for New York  
State  
Qualified in Queens County  
Cert. filed in New York County  
Commission Expires March 30, 1975



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA	:	
-v-	:	<u>SUPPLEMENTAL</u>
	:	<u>AFFIDAVIT</u>
JEREMIAH SCANLON,	:	S73 Cr. 790
PATRICIA ANN SADOWSKY, and	:	
JANE DOE, a/k/a "Sue",	:	
Defendants.	:	

- - - - - x

STATE OF NEW YORK	)	
COUNTY OF NEW YORK	:	ss.:
SOUTHERN DISTRICT OF NEW YORK	)	

JOHN P. COONEY, JR., being duly sworn, deposes  
and says:

1. I am an Assistant United States Attorney  
in the office of Paul J. Curran, United States Attorney  
for the Southern District of New York, and am in charge of  
the above captioned case. I make this supplemental  
affidavit in opposition to the defendant Jeremiah Scanlon's  
motion to dismiss the indictment herein.

2. On November 7, 1973, the United States  
submitted affidavits of Robert B. Hemley and of the  
undersigned and a memorandum of law in response to the  
defendant's motion. The United States asks that those  
affidavits and the memorandum of law be included herein  
by reference.

JPC:ka

3. On November 28, 1973, I obtained from the file room, closed criminal cases, Room 506, and obtained the file relating to Indictment 73 CR. 578, a superseded and dismissed indictment in <sup>this</sup> ~~that~~ case. Among the papers in that file, were the United States Magistrate's docket sheets with respect to the complaint filed against the defendant, No. 73-862.

4. I made xerox copies of those docket sheets and the copies attached hereto as Exhibit A are true and correct copies of those docket sheets. Both docket sheets bear notations that the hearing held on June 11 and 12, 1973 was a "Bail Modification Hearing" and a "Government Bail Hearing", as stated in the affidavit of Assistant United States Attorney Hemley, and not a preliminary hearing, within the purview of Rule 5.1(c)(1).

5. Also attached hereto as Exhibit B is an affidavit of Special Agent Fredrick Laugh with respect to his appearance at this bail hearing.

WHEREFORE, the Government respectfully requests that the motion of the defendant Jeremiah Scanlon be denied.

---

JOHN P. COONEY, JR.  
Assistant United States Attorney

Sworn to before me this  
day of November, 1973.



EXHIBIT A

Mag#5

MEMORANDUM

Time 12<sup>00</sup>

A.U.S.A. Hevelly

Docket No. P82

Defendant(s), warned of his right to remain silent and that if he should choose to say anything it can be used against him in the future.

The charge of violation of 21 U.S.C. P12P41 explained..  
Advised of right to counsel at all stages of proceeding and that if he has no funds counsel will be assigned.

Defendant's Name	Name of Own Counsel	Name Assigned Counsel	Counsel at I.P.	Bail Disposition
Jessie C. Brown		Lyndell (Haw)		1000 R.R.
				remained 2500000
				V. Corp.
	6/10/73 - Bail Disposition -			Dep. N.Y.C.
	- Bail increased to \$20,000			who saw
	Reported in possession of			financial
	of 1/2			means

Preliminary Examination:

June 18, 1973 - 1/144  
 and received 25,000 cash  
 Travel citizen - visitor's visa  
 staying in friend's apt - no money  
 self employed - here to set up boutique  
 no previous criminal record.  
 - present in possession of Gov't.

to report  
 to remain  
 a J.P. Att.  
 until  
 departure  
 Com.

trans to CD - Return Def't. to court on Monday AFTERNOON

Dated: New York, N.Y.

8/9

1973

UNITED STATES MAGISTRATE

Mag. #5

MEMORANDUM  
(Disposition Sheet)

Time: 11.00

A.U.S.A. Humbly Docket No. : 73-862

Defendant(s), warned of right to remain silent and that anything said can be used against him, (her), (them) in the future.

The charge of violation of \_\_\_\_\_ U.S.C. \_\_\_\_\_ explained.  
Advised of right to counsel at all stages of proceeding and that  
if defendant has no funds counsel will be assigned.

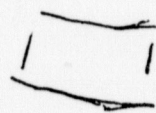
Defendant's Name	Name of Cw. Counsel	Name Assigned Counsel	Counsel at I.P.	Bail Disposition
		Rowland Thore		

PRELIMINARY EXAMINATION:

COMMENTS:

— On 16 <sup>for</sup> ~~See~~ Henry, 11-12, 1973 -

— In re ~~See~~ Pabets -

 and over to increase bail \$50,000  
Bail modified

20,000 Cash or Surety  
condition continued

DATED: New York, N.Y.

197

UNITED STATES MAGISTRATE



JPC,Jr:par

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA, :

-v- :

S73 Cr. 790

JEREMIAH SCANLON, :

PATRICIA ANN SADOWSKY, and :

JANE DOE, a/k/a "Sue", :

Defendants. :

-----x

MEMORANDUM OF LAW

The defendant Jeremiah Scanlon argues that the above described indictment should be dismissed because the tapes of a bail hearing before United States Magistrate Sol Schreiber are inaudible and no transcript of said tapes can be prepared. Without specificity, the defendant Scanlon contends that without these transcripts he is unable to adequately prepare a defense in this case. There is no allegation that the failure to audibly record the proceedings before Magistrate Schreiber was intentional on the part of the Magistrate's staff or the United States Attorney's office.



JCP,Jr:par

The question of the Government's responsibility for the unavailability of the tapes and recordings has commonly been raised in connection with the "best evidence" rule. Typically, the issue is whether the Government should be allowed to introduce transcripts or copies of recordings when the original recordings are unavailable. The law in this area is clear that unless such original recordings are shown to be unavailable through the serious fault, duplicity or fraud of the Government, secondary evidence is admissible as to the content of these recordings. See, e.g., United States v. Maxwell, 383 F.2d 437, 442 (2d Cir. 1967), cert. denied 389 U.S. 1057 (1968); United States v. Knohl, 379 F.2d 427 (2d Cir.), cert. denied 389 U.S. 973 (1967).

Although the facts of these cases are clearly distinguishable from the case at issue, the rule and its policy of these decisions should govern this case. Here, the defendant contends that because of the mechanical failure of a recording machine, the Government should suffer the dismissal of the Indictment against the defendant. In the more extreme factual settings of Maxwell and Knohl, where the content of the tapes was proffered by the Government, the court has ruled that the Government

JPC,Jr:par

should be prejudiced by the unavailability and, presumably, inaudibility only if it is shown that the Government somehow intended to cause the unavailability of the recordings. Unfortunate as the failure of the United States Magistrate's recording equipment to produce a transcribable recording may be, the court should not dismiss this indictment on the basis of such an accidental mechanical failure.

Respectfully submitted,

PAUL J. CURRAN  
United States Attorney for the  
Southern District of New York  
Attorney for United States of  
America

JOHN P. COONEY, JR.  
Assistant United States Attorney

-Of Counsel-



## "EXHIBIT B"

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA :

-v-

AFFIDAVIT

73 Cr. 790

JEREMIAH SCANLON, :  
PATRICIA ANN SADOWSKI, and :  
JANE DOE, a/k/a "Sue" :

Defendants. :

- - - - - X

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

FREDERICK S. LOUGH, being duly sworn, deposes and  
says:

1. I am a Special Agent of the Drug Enforcement  
Administration and am assigned to the above captioned case.  
I make this affidavit in opposition to the defendant  
Jeremiah Scanlon's motion to dismiss the indictment herein.

2. On June 11 and 12 I testified before United  
States Magistrate Sol Schreiber at a hearing to have the  
bail of Jeremiah Scanlon increased. I testified as to what  
I had witnessed and observed in my capacity as surveillance  
agent in the above captioned case.

3. At this bail increase hearing Special Agent  
Thomas Fekete also testified. His testimony concerned  
undercover conversations with the defendant Scanlon which  
indicated that the defendant Jeremiah Scanlon was a poor  
bail risk.



JPC,Jr.:cf

WHEREFORE, the Government respectfully requests that  
the motion of the defendant Jeremiah Scanlon be denied.

---

FREDERICK S. LOUGH

Sworn to before me this  
day of November, 1973.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

AFFIRMATION OF PREVIOUS COUNSEL  
FOR THE DEFENDANT

-against-

72 Cr. 790

DEREKIAH SCANLON, et al.,  
Defendants.

ROLAND THAU, an attorney duly admitted to practice in the United States District Court for the Southern District of New York does hereby affirm under penalty of perjury as follows:

1. I am an attorney duly associated with the Federal Defender Services Unit of the Legal Aid Society, and prior to the defendant's retention of STUART R. SHAW, ESQ., his present counsel, was trial counsel to the defendant and am fully familiar with the facts stated herein.
2. This affirmation is made from memory rather than from consultation with my file, which is unavailable at this moment. I was assigned to represent Mr. Scanlon by the United States Magistrate upon the defendant's arraignment. Shortly thereafter, a hearing was held before United States Magistrate Sol Schreiber at which testified the arresting agent as well as the agent to whom the drugs had allegedly been distributed by the defendant.
3. No court stenographer was in attendance at this hearing which spanned two days, but the proceedings were being transcribed on a recording device manned by a person affiliated with the Magistrate's Court.
4. Some months ago I requested of the Magistrate's Court that a transcript of the above proceedings be prepared and furnished my office, but manpower problems then made it impossible for them to comply and I was asked to have the typing done privately.



5. Since then, Mr. Shaw has replaced my office as counsel to the defendant, and he informs me today that the recording of the hearing mentioned above is inaudible, as a result of which no transcript can possibly be made therefrom.

6. It is my view that the testimonies given by the agents at the hearing are vital to the defense of Mr. Scanlon's case, as counsel could not in good conscience proceed to trial without all testimony heretofore given by material witnesses concerning the factual details of the alleged transaction.

WHEREFORE, the affiant respectfully requests that the Court accept this affirmation in conjunction with papers filed by counsel for the defendant herein.

New York, New York  
Dated: October 30, 1973

Roland Thau  
ROLAND THAU

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130  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

SUPPLEMENTARY AFFIRMATION

-against-

72 Cr. 790

JEREMIAH SCANLON, et al.,

Defendants.

ROLAND THAU, an attorney duly admitted to practice in the United States District Court for the Southern District of New York does hereby affirm under penalty of perjury as follows:

1. I am an attorney duly associated with the Federal Defender Services Unit of the Legal Aid Society, and was trial counsel to the defendant herein prior to the the defendant's present counsel, STUART R. SHAW, ESQ.

2. This affirmation is submitted as a supplementary one to the affirmation submitted on October 30, 1973. Since the making of the last affirmation, affirmant has been informed by STUART R. SHAW, ESQ., present counsel to the defendant, that the United States Attorney's office had opposed a certain defense motion on the basis that a hearing before a United States Magistrate alluded to in affirmant's earlier affirmation had been a hearing to modify bail conditions, the implication being that the evidence did not go to the merits of the charges but simply to the defendant's ties, if any, to the community, and/or likelihood of flight.

3. The affirmant has some independent recollection of the hearing and has a record of notes made by him at the hearing heard by Magistrate Sol Schreiber on June 11 and June 12, 1973.

Two witnesses testified at the hearing, both B. N. D. D. agents. Agent Fred Lough (phonetic) testified that he was a surveillance agent who observed the defendant inside an automobile in the company of undercover agent Fekethe (phonetic). Mr. Lough testified that he observed the defendant pass the contraband to agent Fekethe, whereupon he, Lough, and other surveillance

agents opened the door of the vehicle and placed the defendant under arrest.

[ 3. Agent Fekethe testified at some length about negotiations conducted between himself and the defendant ] about one or more telephone calls made by the defendant to another about various locations at which, and times when he observed the defendant speak to him. He testified in substantial detail about various prices for various quantities of drugs quoted him by the defendant.

[ 4. Agent Fekethe testified that the defendant never passed to him or handed the contraband, in this case ] but that somehow such contraband as was recovered by the surveillance agents was found partly inside the automobile and mostly under the vehicle; in the street.

5. The affirmant believes that the evidence at the hearing went to the very heart and evidentiary merits of this case and not simply to a matter of roots to the community and possibility of flight by the defendant.

WHEREFORE, affirmant respectfully submits this affirmation in support of the defendant's motion for dismissal of the indictment.

New York, New York  
Dated: November 21, 1973

/s/ Roland Thau  
ROLAND THAU

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

-against- :

JEREMIAH EDWARD SCANLON, :

Defendant :

S. 73 Cr. 746 EW  
AFFIDAVIT

-----x  
STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS.:

ROLAND THAU, being duly sworn, deposes and says:

I am an attorney associated with the Federal Defender Services Unit of the Legal Aid Society assigned as counsel to the defendant herein, have represented him since June 9, 1973, the day of his arraignment before a United States Magistrate and am fully familiar with the facts and circumstances herein except as to those matters stated to be known on information and belief.

The defendant was arrested June 8, 1973, and charged by an agent of the Bureau of Narcotic and Dangerous Drugs with possession of cocaine with intent to distribute.

BNDD agent Frederick S. Lough's sworn complaint of June 9, 1973, alleges that a field test of the contraband allegedly seized from the defendant indicated the presence of cocaine.

On or about June 13, 1973, indictment 73 Cr. 578 was returned against the defendant, charging June 8, 1973, possession of cocaine hydrochloride with intent to distribute.

Between his arraignment before the United States Magistrate and his plea of not guilty to the indictment on June 15, 1973, the defendant's bail was progressively in-



creased and he has been in custody in lieu of bail since his arrest.

On information and belief shortly after June 15, 1973, the defendant was transported from The Federal House of Detention for Men in New York City to a federal detention center in Danbury, Connecticut where he was detained some three weeks, without notice to counsel.

On information and belief, during the defendant's incarceration in Danbury, he was visited there by two or more BNDD agents without advise to or consent from counsel; was interrogated and made certain statements to the authorities.

Counsel did not learn of the defendnat's transfer to Danbury until after his return therefrom, and was not consulted by any law enforcement person prior to any interview conducted there.

Sometime in the middle of July, 1973, (exact date uncertain) the deponent happened to be in the detention part of this courthouse on other business when he discovered there that the defendant had been brought to it. The defendant was not due to appear in court that day and neither deponent nor any of his associates had requested he be produced nor was deponent apprised nor were any of his associates that the defendant would be brought to the courthouse.

Deponent's inquiry with the United States Deputy Marshal who had custody of the defendant revealed that the United States Attorney's office had ordered the defendant brought to the courthouse. Shortly after this discovery on deponent's part, the defendant was taken physically to the office of the Assistant United States Attorney handling

this case. Without notice from deponent to the United States Attorney's office nor advice from it to him that the defendant was being brought to the prosecutor's office, deponent accompanied the defendant to the office of the prosecutor, and there, learned from him that the defendant had been brought up for interrogation.

Upon information and belief, the defendant is a citizen of Ireland, resident of Great Britain and not versed in even the minimal knowledge of American law commonly possessed by American laymen.

July 31, 1973, the United States Attorney's office advised deponent that the substance allegedly seized from the defendant June 8, 1973, and which was the subject matter of indictment 73 Cr. 578 was not cocaine but a non proscribed substance, lidocaine.



Within an hour of that discovery, deponent moved the court for a dismissal of indictment 73 Cr. 578 and the government requested an adjournment to the next day. It planned to secure a superseding indictment charging conspiracy later in the day.

July 31, 1973, after defendant moved the dismissal of indictment 73-Cr. 578 the government procured this indictment, charging conspiracy to distribute and possess with intent to distribute narcotic drugs.

Such statements as were taken from the defendant were procured under coercive circumstances, against the advice of counsel, without his knowledge, while the defendant was incarcerated on a charge which the government knew or by the exercise of due diligence should have known to be false.

There is some possibility that the defendant's protracted incarceration was the result of perjury committed before the United States Magistrate and before the Grand Jury on the issue of the nature of the substance allegedly seized from the defendant June 8, 1973.

In this connection, I am advised by a toxicologist that even a cursory, primitive field test would not confuse lidocaine for cocaine as totally different reaction would appear.

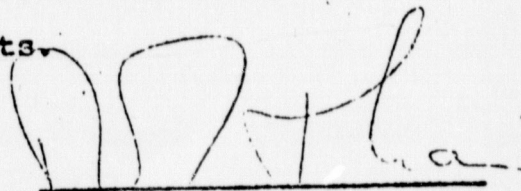
The government's sum total response to deponent's annexed letter dated August 1st is their annexed letter dated August 9th plus photocopy of a June 9th interview and a five photocopied pages of handwritten notes; Deponent was informed August 9, 1973, that even as to the other discovery and inspection and particulars requested and to which the government was consenting, such would have to be supplied some time in the future.

Physical evidence obtained by the government as a result of warrantless searches and following impermissible interrogation of the defendant should be suppressed.

All the requested discovery and inspection and particulars are essential to the defendant's adequate defense sufficiently early before trial to permit analysis and investigation.

It is clear that from the indictment the defendnat is unable either to prepare a defense or to assess the scope of the charge against him.

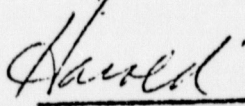
WHEREFORE, it is respectfully prayed that this motion be granted in all respects.



Roland Thau

Sworn to before me this

10th day of August, 1973

 HAROLD TOWNES  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 50-4006125  
Qualified in Westchester County  
Term Expires March 30, 1975

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UNITED STATES COURT OF APPEALS for THE SECOND CIRCUIT

NEW YORK, NEW YORK

UNITED STATES OF AMERICA,

Respondent,

-v-

JEREMIAH SCANLON, et al.,

Appellants.

Index No.  
S73 Cr. 790

NOTICE OF APPEAL

Appellant JEREMIAH SCANLON

PLEASE TAKE NOTICE, that the above named


the United States Court of Appeals for the Second Circuit,  
New York, New York  
hereby appeal(s) to  
sentence of two years United States District Court for the  
Southern District of New York of the  
Court in this action, entered in the office  
of the Clerk of said Court

24th January 74  
on the day of 19

February 6, 1974  
and from each and every part thereof.

Dated:

Yours, etc.,

  
Stuart R. Shaw

Stuart R. Shaw

Defendant

Leavy, Shaw & Horne

Attorneys, Suite 4901 and 2307  
New York, New York 10007

To

Assistant United States Attorney Dan Pykett  
Plaintiff  
Southern District of New York  
Foley Square  
New York, New York 10007

and Respondent;

Hon. J. Edward Weinfeld  
United States District Court  
Southern District of New York  
Foley Square  
New York, New York 10007

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :  
:  
vs. :  
:  
JEREMIAH EDWARD SCANLON, :  
:  
Defendant. :  
:  
- - - - - X

73 Cr. 790

Before:

HON. EDWARD WEINFELD,  
District Judge.

New York, N. Y.,  
November 7, 1973.

Appearances:

PAUL J. CURRAN, ESQ.,  
United States Attorney,  
For the Government;  
JOHN P. COONEY, JR., ESQ.,  
Assistant United States  
Attorney, of counsel.

Leavy, Shaw & Horne, Esqs.,  
Attorneys for Defendant;  
STUART R. SHAW, ESQ., of counsel.

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THE CLERK: Your Honor, the first motion, United States of America v. Jeremiah Scanlon.

Gentlemen, before you address the Court will you please state your name.

MR. SHAW: For the Defendant, Stuart R. Shaw of Leavy, Shaw & Horne, 233 Broadway, New York, N. Y., for Jeremiah Edward Scanlon on Docket No. 73 Cr. 790.

MR. COONEY: For the Government, your Honor, John P. Cooney, Jr.

Your Honor, if I may, at this point I would like to hand up to the Court a memorandum of law and an affidavit.

THE COURT: Why didn't you submit the affidavit before this?

MR. COONEY: Well, your Honor, I'm sorry, I apologize for the tardiness of the submission. It has just been prepared.

THE COURT: All right.

MR. COONEY: I will hand up, with your permission, your Honor --

THE COURT: Have you served a copy on Mr. Shaw?

MR. COONEY: Yes, your Honor, I gave a copy of it to Mr. Shaw just a few moments ago, and he has acknowledged the receipt of that on these papers.

MR. SHAW: Yes, your Honor.

1 THE COURT: All right, proceed.

2 MR. SHAW: Thank you, your Honor.

3 If your Honor please, I just received the affi-  
4 davit and the memorandum and I'm not entirely prepared to  
5 speak to it because included in it are some facts that I  
6 was not aware of before.

7 THE COURT: Let me ask you a question: I went  
8 over your papers - unfortunately, I didn't have Mr. Cooney's.  
9 In what respect are you prejudiced?

10 MR. SHAW: Well, your Honor --

11 THE COURT: Your client was present at these  
12 proceedings, was he not? He had to be.

13 MR. SHAW: Yes, your Honor.

14 THE COURT: Was he represented by counsel?

15 MR. SHAW: Yes, by Roland Thau of the Legal Aid  
16 Society.

17 THE COURT: Well, if there is any issue as to what  
18 was said at that time, any issue that may come up upon the  
19 trial where you would contend that there was information  
20 available to a witness, for example, if you took the posi-  
21 tion that he was testifying differently at the trial from  
22 what he testified before the commissioner, you have avail-  
23 able witnesses to challenge the testimony, do you not?

24 MR. SHAW: Yes, your Honor, but, if your Honor  
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2 please, I think you realize that as defense counsel it is  
3 quite difficult to try to get the facts of the case, in  
4 effect, a discovery --

5 THE COURT: What does your client say happened  
6 before the commissioner? That's what I am trying to find  
7 out.

8 MR. SHAW: Well, your Honor, my client --

9 THE COURT: Was there a hearing?

10 MR. SHAW: Yes, your Honor, it spanned over two  
11 days. Mr. Cooney has informed me in his affidavit as to  
12 why it spanned over two days. But what Mr. Thau recalls  
13 and what my client recalls - and I've tried to piece the  
14 puzzle together - they just don't jibe; there are different  
15 opinions as to what the agents stated.

16 In effect, your Honor, here was a hearing where  
17 two agents testified -- that's what my client and Mr. Thau  
18 states -- about different things. In other words, their  
19 testimony contradicts each other.

20 Mr. Thau's notes are very - are meager, because  
21 his client ordered the minutes. He did order the minutes  
22 but there was not a court stenographer available to prepare  
23 it, and he was advised to get somebody of his own, and he  
24 did order somebody of his own.

25 When I came in on the case I went and tried to



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listen to the tapes and they are incomprehensible.

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Thereafter I went to the magistrate for all my papers and they advised me --

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THE COURT: You state they are incomprehensible. Why is that a basis for dismissal of the indictment?

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MR. SHAW: Well, if your Honor please, I thought I was proceeding perhaps as a friend of the Court, because I think it's a very reprehensible situation when the Government --

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THE COURT: Well, you say it is reprehensible. Of course, there is a case of national fame where there is a claim that a recorder just ran out and didn't record a conversation which allegedly was supposed to be in existence. So what does that mean then? If, in fact, it did happen. And supposing in this instance the tape recorder didn't function, why is that the end of the case?

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MR. SHAW: No, your Honor, it did happen. I would be loath to describe the situation as anyone other than as a friend of the court in this proceeding.

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THE COURT: Are you claiming this was deliberate action on the part of the government?

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MR. SHAW: Your Honor, if I could answer that question in this way: If the IRS came to me on my income tax and they said, "Mr. Shaw, where are your income taxes

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2 which are due? They are being subpoenaed."

3 "I don't know what I did with the forms or any-  
4 thing but I know I did it and I know what happened."

5 They wouldn't be too happy with my answer, and  
6 that's the same way I feel about this hearing. I think  
7 there is a duty on the part of the government or the United  
8 States to provide either a court stenographer or a working  
9 machine. And I have appeared here not only for Mr. Scan-  
10 lon but as a friend of the court. I think it's very repre-  
11 hensible that these machines are utilized.

12 I think a program should be instituted where  
13 either they have machines that do work or court stenographers  
14 are in the magistrate's office.

15 And as defense counsel, it makes it almost impos-  
16 sible for me to proceed, because I don't know what these  
17 two men said.

18 THE COURT: Who are the people --

19 MR. SHAW: I don't know what these men said and  
20 Mr. Thau --

21 THE COURT: I can't get a word in.

22 MR. SHAW: I know I'm not letting you get in a  
23 word edgewise, but I will just finish, your Honor. This  
24 is the last of my argument. Mr. Thau doesn't remember  
25 exactly and my client says that is not what occurred.



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THE COURT: Well, that is what you have not said in your affidavit. You have not pointed out in what respect it is claimed that there is a variance between the testimony allegedly given by these witnesses and Mr. Thau's version of it. And you don't know if there is any variance and you will not know until the men take the stand and testify at the time of trial.

MR. SHAW: Well, your Honor --

THE COURT: If there should be a difference at that time, you are not only free to call Mr. Thau as a witness to contradict them in the circumstances of this case, you would be free to call Judge Schreiber, the magistrate, who heard the matter; and if the assistant was present, whoever he was, whether it was Mr. Cooney or anybody else, you would be free to call them.

Why are you assuming that the testimony is going to be different?

MR. SHAW: Well, your Honor, perhaps I'm utilizing my past experience too much in these type of cases, in narcotic cases where testimony varies.

I would say, your Honor, that a hundred years ago or in another district where there are not so many cases, this would be very viable, because an attorney wouldn't handle as many cases as Mr. Thau does for the Legal Aid



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2       Society and the magistrate wouldn't deal in many matters,  
3       and therefore their recollection would probably be very  
4       sharp.

5                   But here in the Southern District, where there  
6       are so many cases heard by the magistrate, where there are  
7       so many cases heard and acted upon by counsel, Mr. Thau,  
8       and where so much time has elapsed - this happened back in  
9       June - by the time we go to trial it could be that six  
10      months would have transpired and recollection wouldn't be  
11      that strong.

12                  I know that it is a problem just on its face, but  
13       I'm saying that it's the duty of the government and we don't  
14       have to go forward --

15                  THE COURT:    You said that before but it is known  
16       to mankind that machines do malfunction, that they are not  
17       perfect.     A computer goes awry every once in a while.  
18       And what you are saying is that if there is a malfunctioning  
19       of a machine that is the end of the case, and that is not  
20       the law.

21                  I did decide a case -- I haven't asked my clerks  
22       to look for it -- where there was a petition for a writ of  
23       habeas corpus from a judgment of conviction in a state  
24       court, where the court reporter's minutes were lost, he  
25       didn't have the minutes.

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2 A different question might come up if it was a  
3 matter of appealing from a judgment of conviction, but  
4 these witnesses are alive, they are available. You have  
5 the opportunity to cross examine them. And if perchance  
6 your client should contend that their testimony upon the  
7 trial is at variance with their testimony before the magis-  
8 trate, you have three witnesses that you could call: the  
9 Assistant United States Attorney; your own client who could  
10 contradict them; Mr. Thau, the former attorney -- there are  
11 four -- and the magistrate himself.

12 I don't see any problem here.

13 MR. SHAW: Your Honor, would the Court feel free  
14 to state that it would be possible to call my client just  
15 for the limited purpose of stating where a variance had  
16 taken place?

17 THE COURT: If I were trying the case I would.  
18 Is it my case?

19 MR. COONEY: Yes, your Honor.

20 MR. SHAW: It is, your Honor.

21 THE COURT: If you make that request to me, I  
22 will grant that request now, even if the prosecution ob-  
23 jects. I don't know why they should, though. But I don't  
24 see any basis for a claim of prejudice. That's all I am  
25 saying to you.



MR. SHAW: Well, your Honor, I guess --

THE COURT: All you are saying is that you want this transcript in the hope that there is something in there that you can use effectively to cross examine the witness to show a contradiction. Isn't that all it comes down to?

MR. SHAW: Yes, your Honor. And I have utilized the transcripts in the past, and in all my experience, in these short years, when I hold the transcript before a man on the stand and say, "Did you testify before the Honorable Judge, whoever it might be, on such and such a date" --

THE COURT: I agree with you.

MR. SHAW: And that's how I impeach a witness, and if you don't have that, and just call somebody else and everything, it's very likely that a jury would say, "Gee, that judge had a lot of cases," because that's what the government can argue at that point, maybe he forgot exactly; that lawyer hears a lot of cases; the man that's out there with the client, he's being charged, why should he believe him.

THE COURT: Mr. Shaw, the only difference is --

MR. SHAW: The minutes would be the best evidence.

THE COURT: -- that you are acting on the assumption that I am not prepared to accept, and that is that



there would be a variance - a deliberate variance - in the testimony given at the hearing before the magistrate and that offered upon the trial.

MR. SHAW: Well, your Honor --

THE COURT: Let me hear Mr. Cooney, in any event.

MR. COONEY: Yes, your Honor.

THE COURT: What happened at the magistrate's hearing?

MR. COONEY: Your Honor --

THE COURT: Was this a hearing on the question of probable cause?

MR. COONEY: No, it was not, your Honor.

This case at that time was handled by Mr. Hemley. The time frame was that Mr. Scanlon was arrested on June 8th, a Friday, Friday evening; he was not arraigned until June 9th, Saturday morning. At that time, your Honor, his bail was set at \$10,000 personal recognizance bond, secured by \$2,500 cash.

Over the weekend, the government decided that they would like to have that bail increased.

If your Honor will recall, Mr. Scanlon is an Irish citizen, and the government felt and feels that he was involved in substantial narcotics transactions.

The hearings brought on before Judge Schreiber on

June 11th, I believe, your Honor, at first, was an application solely for the purpose of increasing the bail.

Now, my understanding is, after talking to Mr. Hemley -- Mr. Hemley's affidavit accompanies my own -- that Magistrate Schreiber required the government to actually bring in one of the agents so that that agent might describe some of the representations made by the defendant Scanlon in the course of this transaction. Those representations were introduced for the purpose of establishing that this man was involved in heavy narcotics traffic.

THE COURT: If I understand you then, there was no testimony taken on the complaint itself; with reference to the complaint, there was no hearing on probable cause.

MR. COONEY: No, your Honor. I was about to say that the Government's position is that Rule 5 (1) (c), which requires a record for a probable cause hearing, is inapplicable in this case, because this is a bail application.

THE COURT: Won't you answer a question directly? Was this only a bail application or was it a hearing on probable cause?

MR. COONEY: It was a bail application, your Honor.

THE COURT: Why don't you say so? It puts the



whole thing in a different context.

MR. COONEY: Yes, your Honor. Rule 5 (1) (c) is inapplicable, the Government contends. It was not required that a record be kept, but Magistrate Schreiber apparently kept a record of the bail application hearing. It was, in fact, held on June 12th.

At that hearing Agent Facetti testified. Mr. Hemley has checked the records in the magistrate's court on this, and the only record they have is that Agent Facetti testified.

THE COURT: What did he testify to?

MR. COONEY: Your Honor, he was the undercover agent in this case, and it is my understanding that he testified to some of the conversations that Mr. Scanlon had with him, Agent Facetti, concerning Mr. Scanlon's previous narcotics involvement.

Apparently Magistrate Schreiber decided to put that on the record and the record is inaudible. The Government is --

THE COURT: What you are saying, if anything, the testimony would be adverse to the defendant.

MR. COONEY: As far as the content of the testimony, yes, your Honor. I couldn't say that Mr. Shaw is incorrect that if there were contradictions, which I don't contend



were, he might be able to do something with it.

But the content of that testimony was to increase the bail -- it was introduced to increase the bail, and the bail was increased on the 12th to \$20,000 cash, I think it was, your Honor, and ultimately it was increased to \$50,000.

In the Government's memorandum, which was just handed up to the Court, it cites several cases dealing with this question in a different context, a different factual context.

There seem to be quite a few cases where tapes or original tapes or recordings are either lost or inaudible or destroyed by the Government and the Government tries to introduce transcripts of those tapes, and the best evidence question is introduced.

And the rule in this circuit seems to be clear that if the Government -- if the tapes are lost or destroyed or whatever without fault or intention or duplicity on the part of the proponent of the secondary evidence, the proponent should not be prejudiced. And the Government considers that to be the applicable policy in this case.

Mr. Shaw does not contend that it was an intentional act on the part of the magistrate's staff or on the part of the United States Attorney's office, but there was a mechan-

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ical failure, and the Government contends that the simple  
mechanical failure that apparently occurred, although it is  
regrettable, should not be a basis for the dismissal of the  
indictment.

THE COURT: Is there anything else you want to  
say, Mr. Shaw?

MR. SHAW: No --yes, your Honor, just to say  
that Mr. Thau said that two agents testified. They testi-  
fied as to the --

THE COURT: You weren't there. Do you want an  
opportunity to get an affidavit from Mr. Thau, a further  
affidavit from Mr. Thau?

MR. SHAW: Yes, your Honor.

THE COURT: I want him to direct his affidavit  
to whether or not there was a probable cause hearing or  
whether, as Mr. Hemley swears, the testimony was taken before  
the magistrate on the issue of bail increase.

MR. SHAW: Your Honor, I would just state to  
that argument -- and I wouldn't disagree with the affidavit  
of the U. S. Attorney if that occurred, that's what occurred  
but despite the fact that it was a bail hearing, it was a  
protracted hearing. There were five tapes and it went on  
for quite a long time, obviously, and in those hearings --  
in that bail hearing it becomes tantamount to a probable



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cause hearing, because that's the subject matter that they went into.

And correct me if I'm wrong, Rule 5 (1) (c) doesn't necessarily call for a probable cause hearing. It says in a hearing where -- and the cases that flow from that section -- states that where discovery is utilized by counsel, that sometimes this is the most advantageous time, the most important time, for counsel for the defense to procure this material, and to be deprived of this is to deprive the defendant of his constitutional rights.

THE COURT: You have to have a lot more than that. How long will you take to get Mr. Thau's affidavit?

MR. SHAW: I will try to get it by Friday afternoon.

THE COURT: Suppose you get it in Friday and serve a copy on Mr. Cooney, and I will put this down for continued argument on Tuesday afternoon. That will be at 2:15 in Room 1305.

MR. SHAW: Thank you, your Honor.

MR. COONEY: Thank you, your Honor.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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UNITED STATES OF AMERICA, :  
-against- :  
JEREMIAH SCANLON, : 73 Crim. 790  
Defendant. :  
-----x

New York, New York  
November 27, 1973

B e f o r e :

HON. EDWARD WEINFELD,

District Judge.

A p p e a r a n c e s :

PAUL J. CURRAN, ESQ.,  
United States Attorney,  
JACK COONEY, ESQ.,  
Assistant United States Attorney.

ROY JACOBS, ESQ. and  
STUART R. SHAW, ESQ.,  
Attorneys for defendant.

2 THE CLERK: U.S.A. against Jeremiah Scanlon.

3 MR. JACOBS: Application, your Honor.

4 We have been unable to locate Mr. Cooney.

5 THE COURT: Where is Mr. Cooney?

6 MR. JACOBS: We have called him.

7 THE COURT: He was here. I saw him here several  
8 times. You weren't here. This matter has got to be  
9 resolved. It is a criminal matter and I will put it down  
10 for trial.

11 MR. JACOBS: If I may, your Honor, I am here --  
12 Mr. Shaw is on trial -- to explain what happened since the  
13 last time I was here. He prepared an affidavit for Mr.  
14 Thau to sign, and I gave it to him last week and he called  
15 chambers this morning and apparently Mr. Thau has not  
16 forwarded it to you yet, but I did bring a copy of the  
17 affirmation.

18 THE COURT: It isn't an affidavit or affirmation  
19 until he signs it. I think you had better wait until Mr.  
20 Cooney gets here. He was here on time. You weren't here  
21 on time. We will call it again.

22 \* \* \*

23 THE CLERK: United States of America against  
24 Jeremiah Scanlon.

25 MR. COONEY: The government is ready, your Honor.



1 MR. SHAW: Ready.

2  
3 THE CCURT: Mr. Shaw, how long are we going to  
4 carry this matter along?

5 MR. SHAW: Your Honor, I am sorry.

6 THE COURT: Under the rules, this case should be  
7 set down for trial.

8 MR. SHAW: Your Honor, I understand. Let me  
9 try to explain this. I hope I am not as vociferous  
10 as the previous case on tapes also.

11 THE COURT: That is an unfortunate setup.

12 MR. SHAW: If your Honor please, in order to get  
13 the papers to the Court, despite the fact I was on trial  
14 last week and on trial today, I made every effort with  
15 Mr. Thau of the Legal Aid Society. I know his problems  
16 because I was a Legal Aid lawyer myself and very involved  
17 in the Legal Aid Society. They are underhanded with  
18 secretaries. They don't have enough.

19 THE COURT: You didn't mean underhanded.

20 MR. SHAW: I didn't mean it that way. They are  
21 shorthanded.

22 Your Honor, in order to aid Mr. Thau, I had my  
23 secretary take his affirmation over the phone. I didn't  
24 interrupt the conversation. I had my secretary type it up.  
25 I had it sent to him immediately for the purpose of him



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2 signing it and presenting it to the Court. That was as  
3 much as I could do to aid Mr. Thau and the Court under the  
4 circumstances.

5 That was done last week, as soon as my associate  
6 from my office appeared here and advised Mr. Thau hadn't  
7 handed it in to you yet, your Honor. That was done last  
8 Thursday, which means he should have got the letter Friday  
9 or the latest Monday morning.

10 This afternoon when I came into this courtroom --  
11 I just came from a jury trial in Brooklyn -- my associate,  
12 Mr. Jacobs, advised me of the fact Mr. Thau hadn't given  
13 you a signed affirmation as yet.

14 I have done everything I believe is physically  
15 possible that an attorney can do under the circumstances  
16 except to grab Mr. Thau and bring him here.

17 THE COURT: Is Mr. Thau still with the Legal Aid?

18 MR. SHAW: Yes. I know what Mr. Jacobs did to  
19 you last week. Mr. Thau was sick but since that time he  
20 returned. It is possible in the interim he had a relapse.  
21 I know his son was sick and he was sick. When I spoke to  
22 him on the phone and then he got on the phone with my  
23 secretary, he dictated this affirmation. All I have is a  
24 copy. I don't have a signed copy myself but I sent them  
25 all out to him, and he said he would send me back a signed

2 copy, one to your Honor and one to Jack Cooney here.

3 THE COURT: Let me see the affirmation in the  
4 meantime.

5 (Document handed to Court.)

6 THE COURT: What does the magistrate's docket  
7 show as to the nature of the hearings?

8 MR. COONEY: Mr. Hemley, before he prepared  
9 his affidavit which had been submitted to the Court, went  
10 down to the magistrate's office and checked the magistrate's  
11 calendar and document or notes. I am not exactly clear what  
12 he did check, but he had what they had on that hearing,  
13 and it indicated it was a bail hearing.

14 It also indicated, I believe, that only one  
15 witness appeared. I believe that was Mr. Vaccetti or  
16 Agent Vaccetti.

17 Mr. Hemley's recollection was not clear whether  
18 Mr. Lowe had also appeared.

19 THE COURT: What does Mr. Lowe say?

20 MR. COONEY: I haven't checked with Mr. Lowe.

21 THE COURT: Don't you think you should do that?

22 MR. COONEY: I will.

23 THE COURT: How long is this going to drag out?

24 MR. SHAW: I don't know, your Honor.

25 THE COURT: I have trouble getting Mr. Thau's



1 affidavit, but I don't know why you should have trouble  
2 getting an agent's affidavit. I understand that is why  
3 the magistrate's docket isn't clear on this.  
4

5 Do you have a copy of the magistrate's docket?

6 MR. COONEY: I do not.

7 THE COURT: Why don't you do that, too? Do you  
8 want me to prepare your case for you?

9 MR. COONEY: No. Mr. Hemley checked that prior  
10 to the time we submitted the original papers.

11 THE COURT: The agent testified. You claim it  
12 was a bail hearing. You should find out.

13 MR. COONEY: That is right. I don't believe this  
14 affidavit or this proposed affidavit contests that.

15 MR. SHAW: I would respectfully submit that, as  
16 I stated the first time I appeared before you on this  
17 motion, this alleged bail hearing which we claim went into  
18 evidentiary facts and was in fact a preliminary hearing,  
19 in effect, lasted for over five reels, five and a half  
20 reels of tape, and that is a very long bail hearing.

21 THE COURT: The basic question is whether or not  
22 you are prejudiced by reason of the fact that tapes somehow  
23 or other became destroyed, and everything is happening  
24 with tapes these days. The witnesses are still available  
25 to testify. You still have the opportunity to cross examine



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2 them if they do testify on behalf of the government. I  
3 don't know what the problem is. Your problem simply is  
4 you think there is something that was said at the time that  
5 might be useful on cross examination.

6 Acknowledging that this is so, and it is purely  
7 conjectural, the fact is the tapes are not here and there is  
8 no basis for any claim the government itself was responsible  
9 for it. I don't understand the theory on which the indict-  
10 ment should therefore be dismissed.

11 MR. SHAW: Your Honor, again, I know I haven't  
12 been able to be too eloquent on this point, but I would  
13 simply state this, that when a trial attorney is trying  
14 to impeach the testimony of a witness --

15 THE COURT: It is always helpful to have the  
16 prior testimony. There is no doubt about that. I am sure  
17 you don't have to tell that to me.

18 MR. SHAW: Furthermore, your Honor, the very  
19 able U. S. Attorney's office has noted in their affidavit  
20 to the Court that only one person testified. Now, Mr.  
21 Thau has made an affirmation-- admittedly you don't have  
22 it signed -- that two people testified.

23 THE COURT: Mr. Shaw, we spent a lot of time on  
24 this matter. I have given you ample opportunity to get  
25 Mr. Thau's affidavit, affirmation or statement. Get it

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2 in no later than tomorrow. I will give you until 5:00  
3 o'clock tomorrow.

4 You, Mr. Cooney, how long would you require?  
5 if the agent is around, there is no reason you can't get  
6 his affidavit tomorrow, and also whatever docket sheet  
7 there is, whatever record there is in the magistrate's  
8 office, and attach that as part of the affidavit. Let's  
9 move on with this thing. It's been on this calendar four  
10 times. The case is being held up.

11 MR. SHAW: Yes, your Honor.

12 THE COURT: I am permitting you to submit the  
13 affidavit because I will tell you now that I am not  
14 satisfied there is any prejudice to your case. I am going  
15 to deny your motion to dismiss the indictment and you  
16 will have a full record in case it goes to trial and I  
17 will fix a date.

18 How long will it take for trial in this case?

19 MR. COONEY: I would say it would take the govern-  
20 ment a day to put in its case.

21 THE COURT: I will put this down for next Tuesday  
22 morning, December 4th.

23 MR. COONEY: For trial, your Honor?

24 THE COURT: Yes. Why do you look so startled.

25 MR. COONEY: I didn't mean to look startled.



1 MCD  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 -----X

5 UNITED STATES OF AMERICA

6 -against-

73 Cr. 790

7 JEREMIAH SCANLON, PATRICIA ANN  
8 SADOWSKY, and JANE DOE,  
a/k/a SUE,

9 Defendants. ,

10 -----X

11 New York, N. Y.  
12 December 4, 1973  
10:30 a.m.

13 Before:

14 Hon. Edward Weinfeld,  
15 District Judge.

16 APPEARANCES:

17 PAUL J. CURRAN, Esq.  
18 United States Attorney for the  
Southern District of New York  
19 By: DANIEL U. PYKETT, Esq.  
LAWRENCE S. FELD, Esq.,  
20 Assistant U. S. Attorneys

21 STUART P. SHAW, Esq.  
Attorney for Defendant SCANLON

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THE CLERK: United States of American versus Jeremiah Scanlon. Is the government ready?

MR. PYKETT: The government is ready.

THE COURT: Where is the defendant?

MR. PYKETT: The defendant is represented by Mr. Shaw, your Honor. He is in West Street. I have advised the marshals to produce him here this morning at 10:30.

Here is Mr. Shaw.

MR. SHAW: Good morning, your Honor. The defense would request 15 minutes to speak with the U. S. Attorney. With all due respect, your Honor, I think that it might save the Court a lot of time and energy and great expense to the taxpayers because there may not be a necessity of going forward.

THE COURT: The Court will take a short recess.

(Recess.)

MR. SHAW: Your Honor, in regard to United States versus Jeremiah Scanlon, Indictment No. 73 Criminal 790, at this time my client wishes to withdraw his plea of not guilty to the two counts in the indictment and enter a plea to Count 1 of the indictment. That is a conspiracy count, your Honor. It is my understanding that the plea will be entered and that the plea will be acceptable to the

2 U. S. Attorney and the second count of the indictment will  
3 be dismissed.

4 THE COURT: That application to dismiss will be  
5 made at the time of sentencing.

6 MR. SHAW: Yes, your Honor.

7 THE COURT: All right, Mr. Clerk.

8 THE CLERK: Mr. Scanlon, Count 1 of this  
9 indictment charges that from on or about the 5th day of June,  
10 1973 and continuously thereafter up to and including the  
11 date of the filing of this indictment, which was August 10,  
12 1973, Jeremiah Scanlon, Patricia Ann Sadowsky and Jane Doe,  
13 also known as Sue, the defendants, and others to the grand  
14 jury unknown, unlawfully, intentionally and knowingly  
15 combined, conspired, confederated and agreed together to  
16 violate the United States Narcotics Laws. It was part of  
17 said conspiracy that you would unlawfully, intentionally  
18 and knowingly distribute and possess with intent to distri-  
19 bute Schedule I and II narcotic drug controlled substances,  
20 the exact amount thereof being to the grand jury unknown.

21 Mr. Scanlon, do you understand the charges  
22 described in Count 1?

23 DEFENDANT SCANLON: Yes, sir, I do.

24 THE CLERK: At this point do you wish to withdraw  
25 your previous plea of not guilty and plead guilty to Count 1



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2 only?

3 DEFENDANT SCANLON: Yes.

4 BY THE COURT:

5 Q Please state your full name.

6 A Jeremiah Edward Scanlon.

7 Q You have just heard the clerk of the court  
8 read the first count of the indictment, a conspiracy count,  
9 to you. Did you understand the charges that were read to  
10 you?

11 A Yes, I did.

12 Q Is it correct that prior to today's date and  
13 before you heard the clerk of the court read this count of  
14 the indictment that you had a copy of it?

15 A Yes, I did, and my lawyer.

16 Q Who is your attorney in connection with this  
17 charge?

18 A Mr. Shaw.

19 Q The gentleman standing alongside of you?

20 A Yes.

21 Q How long, approximately, has Mr. Shaw been your  
22 attorney in connection with this charge?

23 A Approximately two months, two and a half months.

24 Q During the period of time that Mr. Shaw has  
25 represented you, have you had a full and ample opportunity



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to discuss the charge contained in this indictment with  
Mr. Shaw?

A Yes, I have.

Q Have you given him all the facts as far as you  
are concerned with respect to the charge against you?

A I have, yes.

Q You heard Mr. Shaw's statement to the Court that  
it was now your desire to withdraw your plea of not guilty  
previously entered to this count of the indictment as well  
as to the second count and to plead guilty to the first  
count of the indictment, the conspiracy count?

A Yes, that is so.

Q Was Mr. Shaw's statement to the Court made with  
your consent and authority and after you had full opportunity  
to discuss all matters pertaining to the charge with him?

A Yes.

Q Do you understand that no matter how you may  
view the evidence that you believe the government has  
against you or Mr. Shaw's view as to how strong the govern-  
ment's case against you may be, that you have an absolute  
right, a constitutional right, to stand trial on this charge?

A I do, yes.

Q And that there is no requirement in any respect  
that you prove your innocence, but the government has the

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burden of proving your guilt; do you understand that?

A Yes.

Q And that if the case were to be tried, it would be tried to a jury of twelve persons, and in order to succeed upon this charge against you, the government would have the burden of proving to the satisfaction of each and every member of that jury of twelve, beyond a reasonable doubt the charge was true; do you understand that?

A Yes, I do.

Q And if all the members of the jury were not satisfied the government sustained its burden of proof you could not be convicted of this charge?

A Yes.

Q Do you also understand that if the case were to be tried you have a right to listen to all the government's witnesses, here, whatever their testimony may be, and your lawyer, Mr. Shaw, would have the right to cross-examine those witnesses and you could get all the government's proof in the case; do you understand that?

A Yes.

Q At the end of the case the decision as to whether or not you would testify in your own behalf would be up to you and that you have a right to remain silent and not testify; do you understand that?



1  
2 A Yes.

3 Q And also if that did occur, that is, if you  
4 decided not to testify in your own behalf, the government  
5 prosecutor could not comment to the jury upon your failure  
6 to testify; do you understand that?

7 A I do, yes.

8 Q Do you also understand that if your offer to  
9 plead guilty is accepted a record will be made on the books  
10 of this court just the same as if the jury had returned a  
11 verdict of guilty after a trial, that is, a judgment of  
12 conviction will be entered on the record; do you understand  
13 that?

14 A Yes, I do.

15 Q By your offer to plead guilty you are giving  
16 up your constitutional right to a trial by a jury of twelve;  
17 do you understand that?

18 A Yes.

19 Q Has any person threatened you in any manner or  
20 coerced you in any respect or brought any pressure to bear  
21 upon you in order to get you to give up your constitutional  
22 right to a trial by jury?

23 A No.

24 Q Have you been advised what the power of the  
25 Court is to impose a sentence if your offer to plead guilty



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Q And you say to the Court that your offer to plead guilty is made of your own free will after full consultation with your attorney and the sole and only reason you are pleading guilty is because in fact you are guilty?

A Yes.

Q Now, I must be satisfied that in fact you are guilty and, Mr. Scanlon, would you tell me in your own words generally what you did insofar as this charge against you is concerned.

A On the 5th of June I was introduced to the co-defendant in my case, Patricia.

Q Is that Patricia Ann Sadowski?

A Yes. And within the next three days we became rather friendly and on the 8th of June, or, rather, the 7th of June some arrangements were made that she would introduce me to a friend of hers who I would make a sale to.

Q A sale of what?

A Of cocaine. On the 8th of June -- I think it was either the 7th or 8th -- on the 8th of June I met this particular person who wasn't the agent involved, but who talked with me in the apartment that she was staying in and then brought me and introduced me to the agent. I don't know if this man is a co-defendant or not, but the only person I have seen on the record is Miss Sadowsky.



I made arrangements and talked to the agent, you know, concerning selling him some cocaine.

Q Were these discussions and the meeting for the purpose of effecting a sale of cocaine?

A Yes.

Q And were you fully aware of what you were doing?

A I was aware of it, yes.

Q And you knew it was a violation of law?

A Yes.

THE COURT: The plea may be entered. The Court will require a pre-sentence report in this case.

The defendant is detained, is he not?

MR. SHAW: Yes, your Honor, he is detained on \$1,500 bail at this time and also he has an outstanding case in Bronx County and I believe the bail there at this time is \$60,000.

THE COURT: What is the status of that case?

MR. SHAW: It was supposed to be on for motions on Monday, but the defendant was brought here to confer with me.

THE COURT: We will put this matter down for January 11th. Is that a convenient date for you? There is the prospect that it may go over three or four days there-